ASIA

A Legal Guide for Business Investment and Expansion

Fifth Edition

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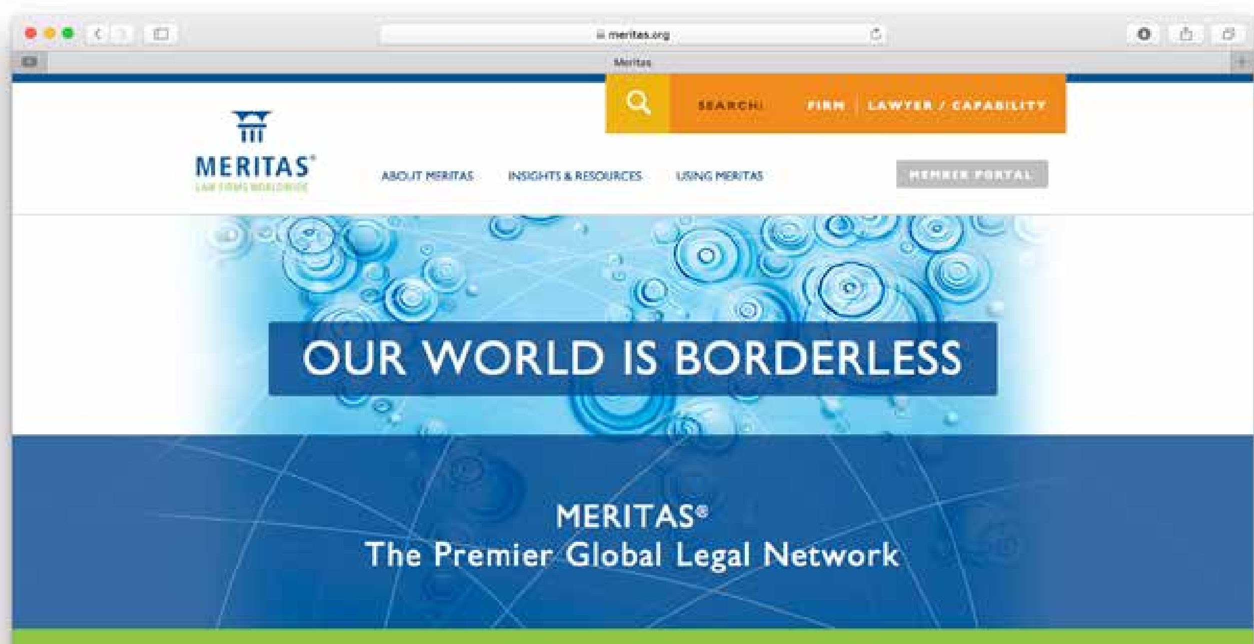

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1. What role will the government of the Philippines play in approving and regulating foreign direct investment?

The following Philippine government agencies are involved in approving and/or regulating foreign direct investments into the Philippines:

The Securities and Exchange Commission (SEC) exercises jurisdiction and supervision over all corporations, partnerships, or associations doing business in the Philippines. Foreign investors desiring to invest in the Philippines may establish various business enterprises (such as a domestic corporation or subsidiary, a branch, or a representative office) by registering under the Foreign Investments Act of 1991 (FIA) and obtaining the appropriate license from the SEC. The SEC is also vested with the power to regulate and formulate policies and recommendations on issues affecting the securities market in the Philippines.

The Board of Investments (BOI) regulates and promotes investments in the Philippines through the grant of fiscal and non-fiscal incentives. The BOI annually prepares and recommends to the President of the Philippines an Investment Priorities Plan, which specifies the preferred areas of investment in the Philippines. Enterprises engaging in preferred areas of investment may register with the BOI and qualify for fiscal incentives (e.g., income tax holiday and exemption from certain taxes) and non-fiscal incentives (e.g., employment of foreign nationals and a simplified customs procedure).

The Philippine Economic Zone Authority (PEZA) regulates investments in special economic zones and industrial estates and promotes such investments through the grant of fiscal and non-fiscal incentives. Export producers or information technology (IT) service exporters may locate in PEZA-supervised and regulated economic zones and IT parks or buildings, which are treated as separate customs territories and, upon registration with the PEZA, enjoy such fiscal and non-fiscal incentives.

The Bangko Sentral ng Pilipinas (BSP) supervises and regulates banks and non-bank financial institutions exercising quasi-banking functions. Its functions include the registration of foreign equity investments and qualified foreign currency loans to enable business enterprises to source their foreign exchange requirements from the Philippine banking system.

2. Is it possible for foreign investors to conduct business in the Philippines without a local partner? What corporate structure is most commonly used and best for foreign investors?

As a general rule, foreign investors may engage in any business activity in the Philippines without a local partner, provided that such business activity is not required under the Philippine Constitution or the laws of the Philippines to be owned wholly or partially by Philippine nationals. The Foreign Investment Negative List (FINL) issued by the President of the Philippines from time to time lists the areas of investments reserved for Philippine citizens or entities that are wholly or partially owned by Philippine nationals.

The corporate structure most commonly used by foreign investors is a Philippine branch office or a Philippine subsidiary. However, some foreign investors choose to establish a representative office, regional headquarters, or regional operating headquarters, depending upon the foreign investors' requirements.

3. How does the Philippine government regulate commercial joint ventures composed of foreign investors and local companies or individuals?

The Philippine government will require commercial joint ventures between foreign investors and local firms to comply with the ownership restrictions prescribed under the Philippine Constitution and statutes, which restrictions are listed in the FINL.

The FINL lists ownership restrictions which apply to all enterprises in general, such as the ownership of private lands and domestic market enterprises. There are also ownership restrictions listed in the FINL based on the business activity proposed to be undertaken by the business enterprise, such as telecommunications, advertising, public utilities, etc.

Under the Constitution and the Public Land Act, as amended, only Philippine citizens or a corporation whose outstanding capital stock is at least sixty percent (60%) owned by Philippine nationals may acquire and maintain ownership of private lands.

Under the FIA (as reflected in the FINL), foreign investors may generally not invest in more than forty percent (40%) of the outstanding capital stock of a domestic market enterprise (i.e., an enterprise which produces goods for sale or renders services to the domestic market entirely or, if exporting goods or services, does not consistently export more than sixty percent (60%) of its total output), unless such enterprise has a minimum paid-up capital equivalent to at least USD200,000 (in which case, foreigners may invest in up to 100% of the enterprise's outstanding capital stock). Moreover, if the enterprise involves advanced technologies, as determined by the government, or employs at least 50 direct employees, foreigners may invest in excess of forty percent (40%) of such enterprise's outstanding capital stock, provided its paid-up capital is equivalent to at least USD100,000.

In contrast, foreign investors may own, pursuant to the FIA, up to one hundred percent (100%) of the outstanding capital stock of an export enterprise (i.e., an enterprise that exports at least sixty percent (60%) of its output, whether as manufacturer, processor, service provider, or trader), provided that the foreign investor is not subject to any other restriction imposed by the Constitution or statutes, such as the ownership of private lands or operation of a public utility.

It is well to note that the Anti-Dummy Law of the Philippines, as amended, punishes acts of evasion of Philippine nationalization laws and provides for penal sanctions, including imprisonment of up to fifteen (15) years, plus a fine, against the relevant foreigner, as well as the Philippine "dummy" who allows his name or citizenship to be used for the purpose of evading the nationalization laws.

4. What specific laws will influence the commercial relationship between local agents/distributors and foreign companies?

The relationship between a foreign company and a local agent is primarily governed by the Philippine Civil Code provisions on agency. An agent is a person who has bound himself to render some service, or to do something, in representation or on behalf of another, with the consent and authority of the latter.

A distributor generally transacts business in his/its own name and for his/its own account, and not in the name of another (e.g., for a foreign company). The relationship between a foreign company and its distributor is governed by the Philippine Civil Code provisions on contracts.

The Retail Trade Liberalization Act of 2000 (RTLA) may affect the decision of foreign companies engaged in retail trade as to whether to appoint a local agent or a distributor. The RTLA reserves retail trade enterprises with a paid-up capital of the Philippine Peso-equivalent of less than USD2.5 million to Philippine citizens or to corporations wholly owned by Philippine citizens. Full foreign participation is allowed (subject to certain conditions) in case the paid-up capital of the retail trade enterprise is at least the Philippine Peso-equivalent of USD2.5 million and the investment in establishing each branch or store is at least the Philippine Peso-equivalent of USD830,000. Since the relationship between a foreign company and a local agent is one of agency, the foreign company may only engage in retail trade through an agent if it complies with the above requirements of the RTLA. Foreign companies oftentimes choose to appoint distributors instead of agents to sell and market their products in the Philippines if they cannot, or choose not to, comply with the requirements of the RTLA.

Under the FIA, it should be noted that a foreign company is deemed to be doing business in the Philippines if it appoints representatives or agents domiciled in the Philippines or who, in any calendar year, stay in the country for a period or periods totaling one hundred eighty (180) days or more. However, the appointment of a distributor domiciled in the Philippines, which transacts business in its own name and for its own account, is not considered doing business in the Philippines.

5. In what manner does the Philippine government regulate proposed merger and acquisition activities by foreign investors? Are there any specific areas or industries that are heavily restricted or completely prohibited to foreign investors?

Proposed mergers and acquisition activities are regulated by the Philippine government by requiring foreign investors to comply with the ownership restrictions under the Philippine Constitution and statutes, which are listed in the FINL.

Under the FINL, certain business activities, such as mass media (except recording); retail trade enterprises with a paid-up capital of less than the Philippine Peso equivalent of USD2.5 million; private security agencies; small-scale mining; utilization of marine resources in archipelagic waters, territorial seas, and exclusive economic zones, as well as small-scale utilization of natural resources in rivers, lakes, bays, and lagoons; ownership, operation and management of cockpits; manufacture, repair, stockpiling and/or distribution of nuclear weapons or biological, chemical and radiological weapons and anti-personnel mines; and manufacture of firecrackers and other pyrotechnic devices, are reserved for enterprises wholly owned by Philippine nationals.

On the other hand, certain enterprises, such as those engaged in the exploration, development and utilization of natural resources; ownership of private lands; and operation and management of public utilities, are allowed to have a maximum of forty percent (40%) of its outstanding capital stock to be owned by foreign investors.

On 9 August 2015, Republic Act No. 10667, otherwise known as the Philippine Competition Act (PCA), took effect. It was enacted to promote market competition that will serve the interest of the consumers by allowing them to exercise their right of choice over goods and services offered in the market. To ensure market competition, the PCA adopts a mandatory and suspensory regime for merger notification. Parties to a merger or acquisition (including joint ventures) wherein the value of the transaction meets the prescribed thresholds under the implementing rules and regulations of the PCA are prohibited from consummating their transaction until the Philippine Competition Commission (PCC) approves the transaction, or until the waiting period lapses and no decision has been made by the PCC.

In any transaction covered by the thresholds, the parties are required to notify the PCC within thirty (30) days from the execution of the definitive agreement. Generally, upon submission of the required notification form, the PCC will have fifteen (15) days to determine the completeness of the submission. If the submission is complete, there will be a maximum period of thirty (30) days for the PCC to conduct its Phase 1 Review. During the Phase 1 Review, the PCC may (a) approve the transaction even before the expiration of the period; (b) allow the period to lapse, in which case, the transaction will be deemed approved; and (c) request for additional information. Should additional information be requested, an additional sixty (60) days may be added, at most, for the Phase 2 Review. During the Phase 2 Review, the PCC may (a) approve the transaction even before the expiration of the period; and (b) allow the period to lapse, in which case, the transaction will be deemed approved. These waiting periods have to be considered by foreign investors in planning the timeline of events for a transaction covered by the compulsory notification under the PCA.

An agreement consummated in violation of this requirement to notify the PCC shall be considered void and shall subject the parties to an administrative fine of one percent (1%) to five percent (5%) of the value of the transaction as defined under the implementing rules and regulations of the PCA.

6. How do local labor statutes regulate the treatment of employees and expatriate workers?

Constitution and the Labor Code

The Philippine Constitution and the Labor Code mandate the State to "afford full protection to labor, local and overseas, organized and unorganized..." They ordain the rights to self-organization, collective bargaining and negotiations, peaceful concerted activities, security of tenure, humane conditions of work, and a living wage.

These constitutional and statutory rights regulate and prescribe requirements for:

- Pre-employment, recruitment and placement of workers, and employment of nonresident aliens;
- Human resources/manpower development, and training and employment of special workers;
- Conditions of employment, including minimum labor standards and wages;
- Health, safety, and social welfare benefits;
- Labor relations, and arbitration of labor disputes and employee complaints;
- Union organization, collective bargaining, concerted activities, and unfair labor practices; and
- Termination of employment and retirement from service.

In the implementation and interpretation of labor laws, any doubt is usually resolved in favor of labor.

Regulation of Wages and Labor Standards

Upon employment, employees are entitled to the applicable minimum wage and labor standards, such as normal hours of work and overtime pay. In each geographical region, the Regional Tripartite Wages and Productivity Board sets the applicable floor or minimum wage. Private employers are also required to contribute to the Social Security System, Home Development Mutual Fund (known as the Pag-Ibig Fund), and the Philippine Health Insurance Corporation in behalf of their employees. Rank-and-file employees are likewise entitled to 13th month pay.

Under Wage Order No. NCR-21 which took effect on 5 October 2017, the new minimum wage rate for the non-agriculture industry or sector in the National Capital Region (NCR) is Five Hundred Twelve Pesos (₱512.00). This rate applies to all minimum wage earners in the private sector in NCR, regardless of their position, designation or status of employment and irrespective of the method by which they are paid.

Resolution of Labor Cases

The Department of Labor and Employment (DOLE), through its visitorial and enforcement powers, is the government agency tasked with ensuring compliance by all business enterprises with all labor standards. Disputes involving termination of employment, unfair labor practices, money claims, and damages arising from employer-employee relations may be brought before a labor arbiter, whose decisions are appealable to the National Labor Relations Commission (NLRC), an attached government agency of the DOLE. Decisions of the NLRC are, in turn, appealable to the Court of Appeals and the Supreme Court.

Work Permit and Work Visas of Nonresident Aliens

As a general rule, under the Labor Code, all foreign nationals who intend to engage in gainful employment in the Philippines are required to apply for an Alien Employment Permit (AEP) with the DOLE and a work visa from the Bureau of Immigration (BI).

The AEP may be issued to a nonresident alien after a determination of the non-availability of a person in the Philippines who is competent, able, and willing, at the time of the application, to perform the services for which the alien is desired.

There are several kinds of work visas and the type of work visa that an employer-company may choose to apply for would depend on several factors including the way that the company was organized or formed, the nature and scope of its authorized activities, its location, the nationality of the foreigner to be hired, and the nationality of the company.

The generic kind of work visa is called the pre-arranged employment visa or "9(g) visa" under Section 9(g) of the Philippine Immigration Act. The 9(g) visa is valid for a maximum period of three (3) years (renewable). Foreign nationals who hold elective positions (e.g. President) are only granted a work visa valid for one (1) year (renewable) since these positions are elected by the Board yearly. Prerequisite to the application for a 9(g) visa is the AEP.

A foreign national may apply for a Provisional Work Permit (PWP) with the BI so he can legally commence work while processing his 9(g) visa. The PWP is valid for three (3) months or until the 9(g) visa is approved, whichever comes earlier.

On the other hand, foreign nationals who intend to perform work in the Philippines for a maximum period of six (6) months may apply for a Special Work Permit (SWP) with the BI. The SWP is initially issued for a period of three (3) months and can only be renewed once for the same period. Hence, the total validity of the SWP is six (6) months. Although a foreign national may have an SWP, he will still continue to hold a tourist visa which he must update periodically.

Please take note, however, that there is a limitation on the number of foreign nationals that can be employed by entities registered with the PEZA and BOI.

Entities registered with the PEZA may employ foreign nationals in executive, supervisory, technical and advisory positions, subject to the following conditions:

i. executive positions shall pertain only to president, vice-president, treasurer and general manager, or their equivalents;

ii. the total number of foreign nationals employed by a PEZA-registered enterprise in supervisory, technical or advisory positions shall not at any time exceed five percent (5%) of its workforce, unless expressly authorized by the Secretary of Labor and Employment; and
iii. foreign nationals may be employed in supervisory, technical or advisory positions only if it is certified by the DOLE that no Filipino within the economic zone where the enterprise is operating possesses the technical skills required therefore.

On the other hand, enterprises registered with the BOI may employ foreign nationals in supervisory, technical or advisory positions for a period not exceeding five (5) years from its registration, extendable for limited periods at the discretion of the BOI, provided, however, that when the majority of the capital stock of the registered enterprise is owned by foreign investors, the position of president, treasurer and general manager or their equivalents may be retained by foreign nationals beyond the five (5)-year period. The registered enterprise shall train Filipinos as understudies of foreign nationals in administrative, supervisory and technical skills and shall submit annual reports on such training to the BOI. The number of foreign employees engaged by enterprises registered with the BOI should not be more than ten percent (10%) of the number of its Filipino personnel.

7. What role do local banks and government agencies play in regulating the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?

Conversion of Local Currency and Registration of Foreign Investment

Foreign investors may remit their equity investments into the Philippines in foreign currency. If they intend to source foreign exchange from the Philippine banking system to service remittance of dividends or repatriation of investments, foreign investors should register their investments with the BSP.

A foreign equity investment registered with the BSP is covered by a Bangko Sentral Registration Document (BSRD) issued by the BSP.

Disposition of Foreign Exchange Receipts

Foreign exchange receipts, acquisitions, or earnings of residents from non-trade sources may be used for any purpose and may, at their option, be sold for Philippine Pesos, or retained or deposited in foreign currency accounts, whether in the Philippines or abroad.

Purchasing Foreign Currency

As a general rule, provided that the supporting documents, including the BSRD when applicable, as required by the Authorized Agent Bank (AAB), are presented to said AAB, any person can purchase foreign exchange with Philippine pesos from AABs for outward remittances to pay for such person's foreign exchange obligations abroad.

In September 2016, the Monetary Board of the BSP has allowed the purchase of foreign exchange even without supporting documentation by resident individuals and corporations from AABs for amounts not exceeding USD500,000 and USD1 million per day, respectively, to cover payments to nonresident beneficiaries for legitimate trade and non-trade transactions.

Repatriation and Remittance Privileges

Repatriation of sales or divestment proceeds, and remittance of dividends, profits or earnings accruing to a BSP-registered foreign equity investment, may be effected by AABs without prior BSP approval upon presentation of the original copy of the relevant BSRD, together with other supporting documents.

For an unregistered foreign equity investment, profit remittance and capital repatriation may be serviced using foreign exchange sourced from outside the AABs of the Philippine banking system (e.g., money changers).

8. What types of taxes, duties, and levies should a foreign investor expect to encounter in negotiating an inbound investment in the Philippines?

Taxes in the Philippines are classified either as national or local.

National taxes are payable to the national government, as provided in the National Internal Revenue Code (NIRC) and the Customs Modernization & Tariff Act (effective 16 June 2016). These include, but are not limited to, the following:

Corporate Income Tax at the rate of thirty percent (30%) is imposed on the taxable income (i.e., gross income less allowable deductions and exemptions) of registered corporations (i.e. domestic or resident foreign corporations (RFC)). On the other hand, non-resident foreign corporations (NRFC) are subject to tax at thirty percent (30%) of its gross income from the Philippines.

Capital Gains Tax is imposed on the sale, barter, exchange, or onerous disposition of: (i) real properties considered capital assets; and (ii) shares of stock in a domestic corporation, not traded or sold through the local stock exchange.

Branch Profits Remittance Tax at the rate of fifteen percent (15%) is imposed on any profit remitted by a branch to its head office. It is based on the total profits applied or earmarked for remittance, without any deduction for its tax component (except those activities which are registered with the PEZA). Interests, dividends, rents, royalties, including remuneration for technical services, salaries, wages, premiums, annuities, emoluments or other fixed or determinable annual, periodic or casual gains, profits, income and capital gains received by a foreign corporation during each taxable year from all sources within the Philippines shall be treated as branch profits, but only if effectively connected with the conduct of its trade or business in the Philippines.

Intercorporate dividends received by either a domestic corporation or RFC from a domestic corporation is not subject to tax. A thirty percent (30%) final withholding tax shall be imposed on dividends received by a NRFC, unless subject to the tax sparing provision of the NIRC or entitled to tax treaty relief.

Improperly Accumulated Earnings Tax at the rate of ten percent (10%) is imposed on the improperly accumulated earnings of each corporation, which permits its earnings or profits to accumulate beyond the reasonable needs of the business.

Fringe Benefits Tax is imposed on the grossed-up monetary value of fringe benefits granted to certain employees, which tax is required to be withheld and remitted to the Bureau of Internal Revenue by the employer.

Value-Added Tax (VAT) at the rate of twelve percent (12%) is imposed on the sale or lease of goods or properties, and on services rendered in the course of trade or business. This applies when the corporation's gross annual sales and/or receipts exceed Php3,000,000.00. Importation of goods, whether or not made in the course of trade or business, is also subject to VAT.

Percentage Tax is imposed on persons whose sales or receipts are exempt from VAT, and on domestic and international carriers, persons/entities providing certain communication services, banks and non-bank financial intermediaries, finance companies, insurance companies, and persons/entities selling shares of stock listed and traded through a local stock exchange, among others.

Excise Tax is imposed on imported goods and certain goods manufactured or produced in the Philippines for domestic sale/consumption or for any other disposition (e.g., alcohol and tobacco).

Documentary Stamp Tax is imposed on the execution of documents, instruments, loan agreements, and acceptances, assignments, sales and transfers of obligations, rights or properties.

Tariff and Customs Duties are imposed on imported articles based on the dutiable value of the goods. The duty rate will depend on the tariff classification under which the specific description of the goods falls.

The NIRC has been amended effective 1 January 2018. The tax reform includes amendments on personal Income Tax, Fringe Benefit Tax, VAT, Capital Gains Tax and Documentary Stamp Tax. It includes an increase on the Excise Tax imposed on automobiles, fuels and sugar-sweetened beverages.

Local taxes are imposed by, and are payable to, the local government unit where the pertinent property, person, or business is located, consistent with the provisions of the Local Government Code. These include, but are not limited to, the following:

Local Business Tax, which is an annual tax on the privilege of engaging in business in a particular jurisdiction. It is based on gross receipts or earnings.

Real Property Tax, which is an annual tax levied on real properties (e.g., land, building, machinery and other improvements).

Community Tax, which is an annual tax on resident individuals and juridical persons engaged in business in the Philippines.

9. Do comprehensive intellectual property laws exist in the Philippines and do they provide the same levels of protection for foreign investors as local companies? Will local courts and tribunals enforce IP laws uniformly, regardless of the nationality of the parties?

Intellectual property rights (IPR) are recognized as valuable collections of proprietary rights capable of commercial exploitation and entitled to protection.

The Philippine Constitution states, "The State shall protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law."

The following International Treaties governing IPR have been ratified:

- Berne Convention for the Protection of Literary and Artistic Works
- Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure
- Paris Convention for the Protection of Industrial Property
- Agreement on the Trade-Related Aspects of Intellectual Property Rights
- Patent Cooperation Treaty
- World Intellectual Property Office (WIPO) Copyright Treaty
- WIPO Performances and Phonograms Treaty
- Madrid Protocol System for the International Registration of Trademarks

The following national laws affect IPR:

- The Philippine Intellectual Property Code (IP Code) consolidates and codifies all IP-related laws and provides the legal framework for protecting intellectual achievements.
- The Protection of Layout-Designs (Topographies) of Integrated Circuits Act protects layout-designs of integrated circuits.
- The Indigenous Peoples' Rights Act protects indigenous cultural communities, their cultural sites, ceremonies, indigenous knowledge, practices and biological resources.
- The Plant Variety Protection Act protects plant varieties and defines rights of breeders over new plant varieties.
- The Optical Media Act regulates optical media and addresses violations of IPR by focusing on the source, e.g., raw materials and equipment used in the commission of the crime.

Applying the "principle of reciprocity," protection of IPR extends to Filipinos as well as any person who is a national or is domiciled or has a real and effective industrial establishment in a country party to any convention, treaty or agreement relating to IPR or the repression of unfair competition which the Philippines is a party of or which extends reciprocal rights to Philippine nationals by law.

A foreign national or juridical entity to whom an IPR has been granted may bring an action for infringement, or a civil action or administrative action for opposition, cancellation, unfair competition, false designation of origin and false description, provided such person complies with the reciprocity rule. If such person is not licensed to do business in the Philippines, it may bring such action only if it is not engaged in business in the Philippines.

For IP administrative registrations, a nonresident foreign applicant will have to appoint and maintain a resident agent or representative in the Philippines upon whom notices or processes for judicial or administrative procedures relating to the application or registration of the relevant IP right(s) may be served.

The IP Code also follows the "reverse reciprocity principle" whereby any condition, restriction, limitation, diminution, requirement, penalty, or any similar burden imposed by the law of a foreign country on a Philippine national seeking protection of IPR in that country shall reciprocally be enforceable upon its nationals within the Philippines.

10. If a commercial dispute arises, given the choice between local courts or an international arbitration venue, which would offer a more beneficial forum for fair dispute resolution for foreign investors?

In the Philippines, litigation and arbitration have their respective benefits and drawbacks.

In the event of international commercial disputes, arbitration provides five (5) major benefits that litigation may not, namely:

- Competence. Parties are free to choose arbitrators with the requisite expertise on the subject matter of the dispute. Accordingly, decision-makers in Philippine arbitration will have applicable specialized commercial and/or legal expertise and, thus, are expected to render awards more competently than courts. Note, however, this does not mean that members of the Philippine Judiciary are not adept at resolving international commercial disputes, most especially if the stipulated applicable laws are those of the Philippines. If there is no arbitration clause between parties, and the other party refuses to submit the dispute to arbitration, then the parties will be constrained to litigate their dispute.
- Privacy. Most foreign investors are prime targets for publicity. In arbitration, open hearings or public filings are not the norm. Confidentiality of records is well protected. Thus, arbitration affords the privacy not available in proceedings before local courts (as judicial proceedings and all records are considered public).
- Speed. Disputes are resolved with greater speed in arbitration than in court litigation because of the liberality of evidentiary rules and procedural restrictions. Judicial proceedings related to arbitration are conducted in a summary manner and resolved within shorter time frames than normal court cases. This feature diminishes the disruption of the ongoing business of the disputants.
- Finality. There is relatively little risk that an arbitral award will be set aside or altered by the Philippine judiciary, which espouses the "pro-arbitration bias" and has a severely limited power of review.
- Neutrality. International traders from diverse legal cultures may feel that a local court will not treat them with equal fairness, giving the domestic party the "home-court" advantage. Although Philippine judges are required to be impartial, arbitration comforts foreign investors insofar as neutrality of the decision-makers is concerned. The parties participate in the selection of arbitrators and may choose arbitrators who they feel are impartial. However, both the Corporation Code and the Foreign Investment Act adopt the Principle of Reciprocity. Under this Principle, Philippine judges are required to be impartial and to treat foreign investors and their domestic counterparts alike.

Recourse to litigation is also a viable option, and affords major benefits that arbitration may not, namely:

- Cost. Compared to litigation, the cost of arbitration has risen dramatically in recent years.
- Availability of post-judgment remedies. The final decision of an arbitrator is difficult to vacate or overturn even if erroneous with respect to the merits. In contrast, there are multiple options for the aggrieved party to appeal court decisions and judgments.
- Grant of Interim Relief and Powers. Before the constitution of an arbitral tribunal or the appointment of an arbitrator, or before such tribunal or arbitrator can act effectively after constitution or appointment, parties to arbitration proceedings may apply to the local courts for the grant of such measures and for court assistance in the taking of evidence. In contrast, litigation bypasses this step since courts have these inherent powers.

Aside from litigation and arbitration, the parties may choose to resolve their dispute through an amicable settlement reached through mediation, conciliation or negotiation, pursue administrative remedies, or undergo a multi-tiered or hybrid dispute resolution process.

11. What recommendations can you offer for how best to negotiate and conduct business in the Philippines?

Business should be conducted in the Philippines always in accordance and in compliance with all legal requirements. In this connection, it would be important and useful to engage the services of competent lawyers and advisers who will be able to advise and assist accordingly. Also, it would be helpful to be aware of and to observe, to the extent practicable, local customs and practices in doing business in the Philippines.

12. What practical advice can you share with investors who decide to do business in the Philippines?

In case of a doubt or question as to the interpretation or applicability of a particular law, rule, and/or regulation, it is always advisable to request the interpretation of the relevant government agency tasked to enforce and apply such law, rule, and/or regulation, for guidance. It would be preferable to first ask an informal opinion from the government agency concerned and, only if such informal opinion is favorable, to request the government agency concerned to issue a formal written opinion on the matter. Nevertheless, such opinions of government agencies tasked to enforce particular laws, rules, and/or regulations are always subject to the final determination of the courts as to the proper or correct interpretation and application of such laws, rules, and/or regulations.

13. Does the Philippines currently have any data privacy laws or regulations? How do they affect business activities?

Republic Act No. 10173, otherwise known as the Data Privacy Act of 2012 (DPA), is the comprehensive law governing personal data privacy protection in the Philippines. The DPA was signed into law on 15 August 2012. However, the National Privacy Commission (NPC), which is the government agency primarily mandated to oversee the implementation and administration of the DPA, only promulgated the *Implementing Rules and Regulations* to the DPA (DPA-IRR) last 24 August 2016 (taking effect in September 2016).

The DPA and the DPA-IRR provide for three (3) classes of personal information or data: (1) personal information; (2) privileged information; and (3) sensitive personal information. The DPA applies to the "processing" of all types of personal information, and to any natural and juridical person involved in personal information processing. "Processing" under the DPA is defined as any act or operation done on the personal information, regardless of whether it is composed of a series of acts or set of operations or merely just one act or operation in the whole processing cycle. This includes personal information controllers and processors not found or established in the Philippines but either: (1) use equipment that is located in the Philippines; or (2) maintain an office, branch or agency in the Philippines. The DPA-IRR further states that processing done outside of the Philippines is included in the coverage of the DPA if:

1. The natural or juridical person involved in the processing of personal data is found or established in the Philippines;
2. The processing relates to personal data about a Philippine citizen or resident; or
3. The processing is done by an entity with links to the Philippines, with due consideration to international law and comity.

The framework of the DPA and the DPA-IRR is premised on the three (3) *general* data privacy principles of **transparency, legitimate purpose, and proportionality**. In line with these data privacy principles, the DPA and the DPA-IRR provide for specific requirements such as consent of the data subject and proper notice of the data subjects' rights, and obligations including implement reasonable and appropriate **organizational, physical,** and **technical** measures for the protection of personal information. In case of a **security breach** wherein sensitive personal information, or information that may be used to enable identity fraud, may have been acquired by an unauthorized person, the PIC is required to promptly notify the NPC and the affected data subject(s) within 72 hours from knowledge of, or upon reasonable belief, that such a breach has occurred.

Companies and entities processing personal data whether as a *Personal Information Controller* (PIC) or as a *Personal Information Processor* (PIP), and falling under the following criteria were required to register their Data Protection Officers (DPO) or the Phase I registration with the NPC until 9 September 2017:

1. the PIC or PIP employs at least two hundred fifty (250) employees;

2. the processing includes sensitive personal information of at least one thousand (1,000) individuals; or

3. the processing is likely to pose a risk to the rights and freedoms of data subjects; or

4. the processing is not occasional: *Provided*, that processing shall be considered occasional if it is only incidental to the mandate or function of the PIC or PIP, or, it only occurs under specific circumstances and is not regularly performed. Processing that constitutes a core activity of a PIC or PIP, or is integral thereto, will not be considered occasional.

Notwithstanding the 9 September 2017 deadline for filing applications for Phase I registration, the NPC still accepts the belated filing of Phase I application (i.e., DPO registration).

The NPC is now accepting Phase II registrations for data processing systems until 8 March 2018, which requires a PIC or PIP to provide all relevant information regarding its data processing systems. Data processing systems that involve automated decision-making shall, in all instances, be registered with the NPC.

Section 6 of NPC Circular 2016-03 also recommends the conduct of a Privacy Impact Assessment (PIA) as part of any organization's security incident management policy. NPC Circular 2017-03 issued on 31 July 2017 provides for guidelines on conducting the PIA and requires the PIC or PIP to maintain a record of all its PIA reports. When requested, a copy of the PIA report shall be made available to the NPC for compliance monitoring purposes. Under NPC Circular 2017-03, the conduct of a PIA is one of the ways a PIC or PIP is able to demonstrate its compliance with the DPA, its IRR, and related issuances of the NPC; in the event a personal data breach occurs, or a complaint is filed by a data subject against the PIC or PIP, the conduct of a PIA shall be considered in evaluating if the PIC or PIP exercised due diligence in the processing of personal data.

Violations of the DPA are penalized with mandatory imprisonment and fine. A higher range of penalties is imposed in case sensitive personal information is involved. The maximum penalties are imposed when the personal information of at least one hundred (100) persons is affected ("large scale"). If the offender is a corporation, partnership, or any juridical person, the penalty shall be imposed upon the responsible officers who participated in, or by their gross negligence allowed, the commission of the crime. Where applicable, the court may also suspend or revoke any of its rights under the DPA.

14. Are there any recently passed laws or regulations in Philippines that are expected to affect the activities of foreign investors in the future?

There have been some recently passed laws which eased the foreign ownership restriction on certain business enterprises which may attract foreign investors to invest more in said business enterprises.

For instance, under Republic Act No. 10641, otherwise known as the Foreign Bank Liberalization Act, the Monetary Board may now authorize foreign banks to operate in the Philippine banking system through any one of the following modes of entry: (i) by acquiring, purchasing or owning up to one hundred percent (100%) of the voting stock of an existing bank; (ii) by investing in up to one hundred percent (100%) of the voting stock of a new banking subsidiary incorporated under the laws of the Philippines; or (iii) by establishing branches with full banking authority. Prior to the enactment of the law, such equity participation was only up to sixty percent (60%). Nevertheless, the Monetary Board must ensure that that the control of at least sixty percent (60%) of the resources or assets of the entire Philippine banking system is held by domestic banks that are majority-owned by Filipinos.

Another example would be Republic Act No. 10881 which lifted the foreign

ownership limitations for adjustment companies, lending companies, financing companies and investment houses. The new law allowed foreign nationals to own up to one hundred percent (100%) of the said entities. Prior to the effectivity of the law, foreign ownership limitations in these entities were as follows: (1) forty percent (40%) in adjustment companies; (2) forty-nine percent (49%) in lending companies; and (3) sixty percent (60%) in financing companies and investment houses.

Finally, there is also the PCA which took effect on 9 August 2015 after languishing in Congress for twenty-four (24) years. It is a game-changing legislation that is expected to improve consumer protection and help accelerate investment and job creation in the country, consistent with the national government's goal of creating more inclusive economic growth and promoting market competition. The PCA adopted a mandatory and suspensory regime for merger notification. As such, parties to a merger or acquisition (including joint ventures) wherein the value of the transaction meets the prescribed thresholds under the implementing rules and regulations of the PCA are prohibited from consummating their transaction until the PCC approves the transaction, or until the waiting period lapses and no decision has been made by the PCC. A covered transaction will certainly be affected by this new regulatory requirement.

Aside from anticompetitive mergers and acquisitions, the PCA prohibits anticompetitive agreements between or among competitors, which carry with them the penalty of fine and/or imprisonment. In particular, agreements between competitors restricting terms of trade are *per se* prohibited. More generally, agreements between competitors with the object or effect of substantially preventing, restricting or lessening competition in the relevant market are also prohibited, unless the agreement contributes to improving the production or distribution of goods or services, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits. The PCA likewise prohibits abuse of dominance by a dominant entity. There is a presumption of dominance when the market share of the dominant entity is at least fifty percent (50%). Any conduct by a dominant entity is subject to the rule of reason, such as when the conduct contributes to improving production or distribution of goods or services within the relevant market, or promotes technical and economic progress while allowing consumers a fair share of the resulting benefit.

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